Grievance Mediation

Many of our members' workplaces provide for an informal problem solving mechanism which workers are encouraged to use before continuing with the grievance process. The Public Service Labour Relations Act sets out an Informal Conflict Management System (ICMS) since 2005. In other workplaces or jurisdictions, these systems are known Alternative Dispute Resolution (ADR) Systems.

WHAT IS GRIEVANCE MEDIATION?

- An impartial third party - the mediator - facilitates communication between the parties involved in a dispute and works constructively with them, in a flexible and creative way, to assist them in reaching a resolution.
- The purpose is to reach a mutually satisfactory resolution to a dispute that is sustainable. In the process, the mediator helps the parties realistically evaluate alternatives for settlement.
- The purpose of mediation is not to determine who is right or wrong. A mediator helps shift the focus from one of blame to a creative exchange between the parties. The mediator also helps the parties shift the focus from the past to the future.
- The mediator encourages the parties to communicate with each other so they understand each other's point of view.
- The entire process is voluntary - no party can be coerced into entering, continuing or returning to mediation.
- The mediator does not have the power to render a decision, or to force the parties to reach a settlement.
- The parties agree on the mediator, as each party needs to be personally comfortable with that person and his/her credentials.
- There are no minutes taken of the proceedings. If there is a report issued by the mediator, it is limited to the fact that a settlement was or was not reached. If a mediator takes notes for the purpose of the

mediation, they are confidential and protected from disclosure. If an agreement is reached, the terms of settlement are recorded and signed by the parties. At the beginning of mediation, everyone (i.e., mediator, the parties and their representatives/accompanying persons) signs an Agreement to Mediate that sets out some basic rules governing the process.

- The terms of settlement are binding on the parties. Once a settlement has been reached, there is no longer a dispute between the parties and therefore no matter to be determined by an arbitrator. Labour boards have recognized that it is in the best interests of good labour relations that binding mediation agreements be honoured.
- Use of mediation never prevents a party from using the grievance procedure (or another formal process where one exists) should mediation fail. A participant may switch between mediation and a formal process at any time. Mediation can be used at any stage of the grievance process.
- When the mediator has previous experience as an arbitrator, with the parties' agreement, s/he can help them assess their cases by indicating what arbitrators have decided in similar cases in the past and how an arbitrator might look at their situation. This is sometimes referred to as the evaluative model of mediation. (See below under the title, *What are the disadvantages of grievance mediation?* for comments on this model.) Some jurisdictions follow a facilitative model, such as the PSLRB sessions where PSLRB mediators are used. This allows the PSLRB to draw a fairly clear line between mediation and adjudication. It ensures that when parties take part in mediation, they are participating in an assisted negotiation, and that when they appear before the board in an adjudicative hearing, they will receive a third party decision on the merits of their case.
- Time taken to use mediation does not count against the time limits of formal processes as long as the parties ensure that time limit issues are protected. A grievance, for example, can, upon mutual agreement, be held in abeyance pending the outcome of mediation. For *PSLRA* units, the *PSLRB Regulations* provide for a suspension of time limits.

- Each party may be accompanied or represented by a person (or persons) of their choosing. A person (or persons) who accompanies or represents a party has the right to speak.
- If the issues in dispute revolve around the interpretation or application of a collective agreement, a representative of the bargaining agent must be involved.
- Usually, the parties to a conflict are at the table. It is preferable that individuals responsible for making decisions concerning the settlement also be at the table.
- Anything discussed during mediation is privileged. Any verbal or written communication with the mediator is confidential. Confidentiality is an important factor that influences the participants' trust and confidence in the integrity of the process. Being able to say and do things without prejudice is an important element of open communication and exploring settlement options. Otherwise, the parties would unlikely make offers that are much different from their initial positions. Participants must agree not to use any information gained when using mediation outside of the mediation process. The terms of settlement are also confidential. The mediator cannot be involved in subsequent formal proceedings should mediation fail, including being compelled to testify.
- An employee can't be subjected to any retaliation or reprisal for having participated in, or withdrawn from, mediation.
- Mediation requires a solid systemic foundation in order to be effective. There must be clearly articulated principles and procedures, and adequate training in conflict management for employees. Union involvement in developing and participating in conflict management systems is a necessity.

WHAT ARE THE ADVANTAGES OF GRIEVANCE MEDIATION?

- Mediation gives the parties greater control and flexibility to actively shape a settlement to both the immediate crisis and its underlying causes in a way that best addresses the interests of both parties. At the various levels in the grievance procedure, it is the employer who renders a decision and if the grievance goes before an arbitrator, a binding settlement is imposed.
- The union has the right to consult with the employer with respect to a grievance at each level of the grievance procedure. To "consult" means to seek and provide information, exchange views, listen to each other's opinions, observations and recommendations, prior to a decision being rendered - by the employer. Mediation is a process that offers structured direct negotiation with the employer, prior to a decision being made - by the parties themselves.
- It provides individual grievors with greater involvement in the process and greater input into the outcome. This can result in increased empowerment over their situation.
- The settlement does not set a precedent, so a solution can be crafted to meet the unique circumstances of the situation. The parties will be more comfortable with making commitments and concessions in mediation, if they know these will not damage their case if mediation fails, or be publicized if mediation succeeds.
- Unlike arbitration, mediation can address the issues and interests surrounding and underlying the matter in dispute. It can help to identify and resolve situations that could produce future grievances. Mediation allows the parties to look beyond the symptoms to see problems in a broader perspective than is possible at arbitration, where the emphasis is on the arbitration of rights and the answers to relatively narrow questions. It can result in practical workplace solutions which may lay the foundation for better working relationships.
- A mediated settlement has the potential to include remedies not available at arbitration - e.g., collaborative skills training for union and

management representatives; development of a workplace communications policy; agreeing to the text of a revised job description; agreement to market an employee to another organization or agency, or to transfer an employee between departments; agreement to a job classification review; agreement concerning early retirement; retroactivity (for example an agreement to pay back pay); facilitation of a more comfortable work environment until retirement on full pension.

- While a mediated settlement might not be achieved, mediation has the potential to clarify the issues in dispute and enhance the parties' understanding of what lies behind the conflict.
- Mediation is informal and permits people to simply tell their own stories. The parties are encouraged to speak freely and openly with each other. Unlike arbitration, they are not bound by procedural rules or rules of evidence.
- It teaches people to resolve their own issues, and increase confidence in their ability to do so. When union and management are involved, it improves the ability of those parties to settle grievances or other disputes.
- Mediation encourages face-to-face communication (instead of communicating through their representatives) which can contribute to building and enhancing on-going and long-term relationships. When union and management are involved, it can foster better union management relationships.
- Mediation can be arranged relatively quickly. The process attempts to resolve issues in a short time frame. The longer a dispute lasts, relationships can become worse and morale can suffer.
- Statistics generally tend to demonstrate high levels of satisfaction with the process. Even in cases where a settlement is not reached, the parties rate the process as fair in the vast majority of cases.
- Mediation avoids the adversarial atmosphere and "win-lose" outcome associated with grievance arbitration.

- Over time, as conflict resolution systems evolve and improve, it may result in more issues to surface, especially those rooted in abuse and discrimination, and therefore contribute to healthier workplaces.

WHAT ARE THE DISADVANTAGES OF GRIEVANCE MEDIATION?

- Mediation may not be suitable where there are substantial or systemic power imbalances, especially in situations of harassment, abuse or discrimination. The facilitative influence and competencies of the mediator may be inadequate to address the imbalance, ensure the safety of both parties and protect the integrity of the process.
- The skills, experience and impartiality of the mediator are crucial. A mediator is responsible for protecting the parties and ensuring that they are heard. S/he needs to understand all of the issues that must be addressed, including those related to culture, violence and oppression that might be outside his/her realm of experience. A mediator must ensure that the parties know the options that are available, and have thoroughly considered the risks and advantages of each option. S/he needs to ask hard questions of the parties and probe and check their understanding in pursuit of a resilient, durable agreement. The mediator must make sure that neither party is being taken advantage of and that their decisions are informed and well considered. It requires a high level of competence and many mediators are inadequate for the task.
- Because mediation takes place in private, it is tantamount to a private justice system that might not best serve and protect the public interest. As such, it may fail to bring to light issues that concern and advance those interests. Had *Robichaud* [1] and *Meiorin* [2] been settled in private, society would have been denied the benefits of these landmark cases.
- The confidentiality of the proceedings limits the ability of the union to sensitize and mobilize other members who might be interested or otherwise affected by the issue. It limits the "organizing model" approach to only the member(s) directly involved in the dispute.

- While not a disadvantage per se, the success of mediation may be attributable, in part, to the way the parties have approached the grievance procedure. After all, the procedure is designed for the parties to consult on grievances and attempt to settle them at the lowest possible level. Grievances, and the formal grievance procedure, should be treated as opportunities to solve problems and enhance relationships.
- Employees and their union representatives, without appropriate advice from their advisors, may agree to a mediated settlement that compromises collective rights where entitlements clearly exist, in the interests of maintaining or furthering relationships. This is not a flaw of grievance mediation, but part and parcel of its allure.
- The power dynamics of the employment relationship produces a difference in perceptions between grievors and employers regarding the nature and substance of conflict, and expectations regarding outcomes of mediation. There are many more day-to-day consequences for employees in uncomfortable or hostile relationships with the employer. This may reflect the tendency for grievors to go into mediation with higher expectations than employers, especially in the area of personal relationships. Also, grievors are more likely than employers to see outstanding, unresolved issues following mediation, including concerns about going back into a workplace without a formal change in their circumstances.
- The evaluative model of mediation (i.e., when a mediator provides an opinion on the likely outcome of the dispute at arbitration) can undermine the parties' ability to reach a negotiated settlement. It may also influence one party or the other to focus only on the narrow issues that will be determined by an arbitrator. It can also create a perception of mediator bias.

WHEN MIGHT GRIEVANCE MEDIATION BE APPROPRIATE?

- The parties are willing to try to settle the issue(s) in a cooperative manner.

- An informal and flexible process is preferred over the more formal options.
- A formal process is unlikely to achieve the desired outcomes or a particular remedy.
- Ignoring the problem is not viable.
- There is interest in maintaining or rebuilding the relationship.
- A case is complex and requires a creative solution.
- A rights-based process can't address the fundamental issues.
- The parties prefer to resolve their dispute in private and do not want a public record.

WHEN MIGHT GRIEVANCE MEDIATION NOT BE APPROPRIATE?

- The parties in dispute do not have the authority required to resolve the problem.
- The parties are unwilling to work toward a resolution. Or, a grievor wants the union to resolve the problem without his/her direct involvement.
- Either party wants to be declared right, or see blame assigned to the other party. Either party wants to punish the other. Either party wants to obtain information to use in a formal process.
- There is an absence of good faith.
- A lack of credibility of one party is an issue and integral to the dispute.
- Either party is unable to rationally participate in the mediation.
- A party is challenging the validity of a law, policy or collective agreement provision.
- Expectations of the process and outcomes are unrealistic.
- The parties are clear about their respective interests and positions and one or both parties believe that the matter should be pursued or arbitrated using a rights-based process.
- There is a need to set a precedent with regards to the issue of law or its application.

- The issue is one that should be debated in the public eye.
- There is a physical danger to any persons involved in the process.

[1] *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84.

[2] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

Sources:

Birken, Mitchell S. *Grievance Mediation: The Impact of the Process and Outcomes on the Interests of the Parties*. Industrial Relations Centre, Queen's University. 2000.

Department of Justice Canada. *Summative Evaluation of the Dispute Resolution Fund*. June 2002.

Directive on Informal Conflict Management Systems (Treasury Board Secretariat).

Informal Conflict Management Systems (ICMS Resource Guide).

Macfarlane, Julie; Manwaring, John and Zweibel, Ellen. *Negotiating Solutions to Workplace Conflict: an Evaluation of the Public Service Staff Relations Board Pilot Grievance Mediation Project*. Final Report. March 2001.

Miscellaneous pamphlets from the web sites of provincial and federal labour boards, as well as the Federal Mediation and Conciliation Service.

Skandharajah v. Treasury Board (Employment and Immigration Canada), [2000] PSSRB 114 (166-2-24127)